highly destructive trend in TCPA class actions is plaguing numerous legitimate businesses, particularly those in the telecommunications industry. To illustrate this phenomenon for the Commission: Nextel has been named as the defendant in a TCPA class action lawsuit, not because Nextel or even an advertising firm contracted by Nextel has transmitted fax advertisements, but because an independent contractor of an independent business that happens to sell Nextel services[47] allegedly engaged a fax broadcaster for its advertisements.[48] Such is the plaintiffs bar's zeal in exploiting any ambiguity in the TCPA that even this most attenuated of circumstances is enough to ensnare an unwitting defendant.

Courts no doubt will look to the outcome of this Commission docket to guide their decisions in that litigation and the multitude of other similar cases pending cases across the country. Accordingly, the Commission should act expeditiously to clarify the TCPA rules in order to ensure that they are applied consistently nationwide in a manner that comports with Congressional intent.

In this regard, the Commission first should reaffirm the established business relationship rule for fax advertisements so as to preserve the sanctity of the customer relationship and avoid unduly burdening the right of companies to communicate with their customers. Under the TCPA and the Commission's rules, it is unlawful to use a "telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3). The phrase "unsolicited advertisement" is defined in the TCPA and the Commission's rules as "any material advertising the commercial availability

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[41] Typically, such businesses are independent dealers that operate under a non-exclusive arrangement and sell the services of a variety of wireless carriers.

[48] ***See*** *Coontz* ***v. Nextel.*** District Court of Johnson County, Texas, 249th Judicial District (Cause No. C200100349).

or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.'' 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5). The Commission has rightly concluded that a company's established business relationship with a customer provides the necessary "invitation or permission" for the transmission of fax advertisements to that customer, and Nextel supports that long-standing and understood rule.

Second, the Commission should clarify that the definition of "telephone facsimile machine" does ***not*** extend to computers or fax servers, and the prohibition on unsolicited advertisements does not apply to electronic transmissions to such devices. Both the TCPA and the Commission's rules define "telephone facsimile machine" as "equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text **or** images (or both) from an electronic signal received over a regular telephone line onto paper." 47 U.S.C. § 227(a)(2); 47 C.F.R. § 64.1200(f)(2). Addressing the TCPA's definition of "telephone facsimile machine," the Commission has stated that "[flax modem boards are the functional equivalent of stand-alone facsimile machines."[49] But that determination relates to the type of equipment used to ***send*** a fax, not to receive one, and Congress drew a sharp and deliberate distinction between the technologies involved in sending and receiving facsimile advertisements.

Finally, the Commission should reject the efforts of the class action bar to hold common carriers vicariously liable for the acts of even independent contractors by applying Section 217 of

[49] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, ***Memorandum und Opinion and Order,*** 10 FCC Rcd 12391 ¶ 29 (1995) ***("1995 TCPA Reconsideration Order").***

the Act to TCPA violations. Carriers are no more nor less liable for a TCPA violation by virtue of their common carrier status than any other business entity.

### A. The Commission Should Preserve the Established Business Relationship Rule.

#### 1. The Established Business Relationship Rule

The TCPA prohibits sending "unsolicited advertisements" by facsimile to any person without that person's prior express invitation or permission. The Commission should reaffirm that an established business relationship gives rise to an invitation to communicate by facsimile advertising within the customer relationship, absent any customer objection to the contrary. The Commission correctly determined in its original **TCPA** Report and Order that "a facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient."[50] Subsequently, the Commission has confirmed on numerous occasions that "[i]f the sender and the recipient have an established business relationship, an invitation or permission to receive an unsolicited facsimile advertisement is presumed to exist."[51] Businesses plainly have come to rely on this understanding, and there is no record before the Commission of any complaints arising out of such communications.

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[50] *TCPA Report and Order* at ¶ *54* n.87.

[51] *Telephone Consumer Protection Act Te phone Solic tions. Au dialed and Artificial or Prerecorded Voice Message Telephone Culls, and the Use of Facsimile Machines, Industry Bulletin, 8* FCC Rcd 506 (1993); *see also 1995 TCPA Reconsideration Order* at ¶ *37* ("the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions"); *TCPA Report and Order* at ¶ **54,** n.87 ("facsimile transmission[s] from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient"); FCC Reminds Consumers about "Junk **Fax"** Prohibition, *Public Notice,* 16 FCC Rcd 4524 (2001) ("[a]n established relationship . . . demonstrates consent to receive fax advertisement transmissions").

The Commission acted well within its discretion and delegated authority in adopting this construction because Congress has not "directly spoken to the precise question" of what constitutes "prior express invitation or permission" to receive a facsimile advertisement.[52] Moreover, the Commission's construction of the TCPA is fully consistent with legislative history indicating that Congress did not intend for the statute to unduly interfere with "ongoing business relationships."[53]

The Commission's existing policy does not undermine a consumer's authority to stop faxes to his or her telephone facsimile machine even if he or she has formed an established relationship with the sender. As the Commission has recognized, issues of permission or consent ultimately must be analyzed and adjudicated on a case-by-case basis,[54] and there may be particular facts and circumstances in a given case that would rebut the presumption of prior invitation or consent created by an established business relationship. Such circumstances generally would exist, for example, when the recipient of a fax transmission communicates her wish to the sender that such transmissions stop. Although formal modification to the Commission's rules probably are unnecessary, the Commission may wish to clarify that such "do-not-fax" requests must be honored and effectively terminate the consent otherwise created by an established business relationship.

The Commission's continued application of the current established business relationship rule to telemarketing and facsimile advertising activities — supplemented by the consent

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[52] *Mobile Communications* ***Corp. v. FCC***, 77 F.3d 1399, 1405 (D.C. Cir. 1996).

[53] ***House Report***, H.R. REP. NO. 102-317, at 13; *TCPA* ***Report and Order*** at ¶ 34.

[54] ***See*** *1995 TCPA* ***Reconsideration Order*** at ¶ 37 ("we believe it is appropriate to treat the issue of consent in any complaint regarding unsolicited facsimile advertisements on a case-by-case basis").

framework of the CPNI rules — thus will protect customers' privacy rights while ensuring that they enjoy the benefits of responsible telemarketing by companies such as Nextel.

*2.* Proof that the Fax Advertisement Was Unsolicited, Including the Absence of an Established Business Relationship, is an Element of Proof of a Violation.

As noted above, the Commission has said that "it is appropriate to treat the issue of consent in any complaint regarding unsolicited facsimile advertisements on a case-by-case basis."[55] Nextel agrees, but the Commission should say more, to offer the courts clear guidance regarding the scope and applicability of its rules. For instance, in Nextel's own defense of the pending class action lawsuit in Texas; the court held — in contravention of the Commission's express ruling and federal court precedent in Texas[56] — that an established business relationship does not confer consent to receive a facsimile advertisement. This ruling effectively relieved the plaintiffs of their statutory burden of proving that the faxes in question were "unsolicited."

In order to avoid similar rulings that are contrary to the Commission's rules implementing the TCPA, the Commission should clarify that the plaintiff bears the burden of pleading and proving that the fax advertisements at issue were unsolicited – i.e., the absence of consent, including the lack of an established business relationship, is an essential element of the plaintiffs case.[57] This is no more than the Commission itself practices when exercising its own

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[55] *1995 TCPA Reconsideration Order*, 10 F.C.C.R. 12,391 737.

[56] In these and its other comments, Nextel is not seeking to try its class action defense or prosecute its appeal before the Commission. Rather, it is seeking a definitive statement of the rules from the Commission as the expert agency designated by Congress to implement the TCPA. The absence of such clarity has been the source of much mischief in class action cases around the nation.

[57] Even if the Commission were to decide that the defendant had the burden of providing consent as an affirmative defense, the plaintiff still must bear the ultimate burden because the established business relationship creates a *presumption* of consent that plaintiffs must rebut to prevail. ***See*** *Texas v American Blast* ***Fax.*** *Inc. et al.*, 159 F. Supp. 2d 936, 937-38 (W.D. Tex. 2001).

enforcement powers under the TCPA. Indeed, the enforcement orders listed on the Commission's TCPA enforcement web page each aver that the offending faxes were unsolicited, usually based on the Commission's investigation of an underlying complaint.[58]

### B. The Commission Should Clarify That the TCPA Does not Prohibit the Transmission of Unsolicited Advertisements to Fax Servers and Personal Computers.

The Commission seeks comment on the continued effectiveness of its rules prohibiting the transmission of unsolicited advertisements to facsimile machines and asks whether developing technologies, such as computerized fax servers, might warrant revisiting its rules on unsolicited faxes. Changes in technology, and especially the common use of fax servers and personal computers to ***receive*** faxes, have fundamentally altered the premises for the Commission's original regulations and do indeed merit certain clarifications regarding the scope of the Commission's rules

When the TCPA was passed in 1991, the vast majority of faxes were sent and received by stand-alone thermal paper telephone fax machines. These analog devices had no scanning or receiving memory, operated at slow data transfer speeds, tied up telephone lines for significant periods of time, and consumed expensive thermal paper with every transmission. These considerations lay at the heart of both Congress' decision to regulate fax advertising and its constitutional justification for doing so.

Since the passage of the TCPA, however, data transfer speeds have increased and transmission times have decreased dramatically. Plain-paper fax technology has obviated the need for costly thermal paper. Most important, fax modem technology now enables the delivery of faxes to email inboxes where consumers can electronically retrieve, view ***or discard*** a fax

[58] ***See*** http://www.fcc.gov/eb/tcd/ufax.html.

image without ever reducing it to paper. In light of these changes, the Commission should make it clear that the TCPA does not prohibit the transmission ofunsolicited facsimile ads to fax servers, personal computers, and other devices that will not print a fax without a user command and attachment to a peripheral printer. **As** explained below, the plain language ofthe TCPA, fundamental principles of statutory construction, and constitutional considerations all support such a clarification.

1. Fax Servers and Personal Computers Fall Outside the TCPA Definition of "Telephone Facsimile Machines."

The TCPA and the Commission's implementing rules only prohibit the use of **a** "tclephone facsimile machine, computer, or other device to send *an unsolicited advertisement to a telephone facsimile machine*."[59] They do not, and could not as a matter of law, prohibit the transmission of unsolicited advertisements to devices other than "telephone facsimile machines." Congress expressly defined a "telephone facsimile machine" to mean:

> equipment which has the capacity **(A)** to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper."[60]

Today, fax servers and many personal computers are enabled by fax modem cards or simply connection to the Internet to receive fax transmissions. However. these devices do not have the capacity either to transcribe text or images from paper into an electronic signal, or to transcribe text or images received from an electronic signal onto paper. External devices – *i.e.*, optical scanners and printers – must be attached and used by the recipient to perform these transcription

[59] 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3).

[60] 47 U.S.C. § 227(a)(2).

functions. Accordingly, because fax servers and computer desktops and laptops can neither transcribe text and images from paper into an electronic signal nor transcribe electronic signals representing text and images onto paper without the human intervention of the recipient, these devices fall outside the statutory definition of a "telephone facsimile machine."[61] And because fax servers and personal computers are not "telephone facsimile machines," the transmission of unsolicited advertisements to such devices are not prohibited by the TCPA or by the Commission's rules, regardless of whether the device originating the transmission is a "telephone facsimile machine." The Commission is bound by the plain meaning of the statutory definition of a "telephone facsimile machine," which excludes devices incapable of either transcribing advertising copy from paper to electronic signals or of transcribing electronic signals onto paper."[62]

Fundamental principles of statutory construction and the purposes underlying the TCPA also mandate the conclusion that the TCPA does not prohibit the transmission of fax advertisements to fax servers and computers. The TCPA expressly differentiates between the devices used to send a regulated advertising transmission – *i.e.*, **a** "telephone facsimile machine, computer, or other device" – and the technology used to ***receive*** a regulated fax communication – *i.e.*, a "telephone facsimile machine."[63] Of course, Congress must be presumed to use each word in a statute for a reason, and the Commission must avoid any construction that would render

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[61] Nextel notes that note only does the human intervention necessary to cause transcription take the personal computer or other device out of the definition of fax machine, it likewise is a manifestation of consent to accept the fax.

[62] "If the statute is clear and unambiguous 'that is the end of the matter, for. . . the agency must give effect to the unambiguously expressed intent of Congress." *Bd. of Governors, FRS* v. *Dimension Financial* ***Corp.,*** 474 U.S. 361, 368 (1986).

[63] 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3).

some words in the statute mere surplusage.[64] Accordingly, the Commission must presume that Congress intended to exclude "computers" from the definition of a "telephone facsimile machine," and that it ascribed separate and distinct meanings to these terms.

Furthermore, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."[65] Consequently, given Congress' exclusion of the computer from the technology used to receive regulated fax communications, the Commission must presume that the prohibition against unsolicited fax advertising does not apply to communications sent to computers, in contrast to those sent to telephone facsimile machines.

The careful distinction drawn by Congress between the sending and receiving technology involved in a regulated fax transmission reflects a sensible judgment that the sending technology must be defined broadly to capture any device capable of transmitting a facsimile to consumer or business. However, the receiving technology was defined more narrowly to capture only those devices that by their nature would produce the specific harm to consumers and businesses that the statute was designed to prevent.

**As** the Commission has recognized, "Congress prohibited the transmission of 'junk faxes' to facsimile machines so that costs of advertising could not be shifted to the recipients of facsimile advertisements."[66] Congress was concerned primarily with the printing costs associated with the receipt of an unsolicited fax advertisement by a conventional stand-alone

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[64] *Bailey v. United States*, 516 U.S. 137, 145 (1995).

[65] *Rodriguez v. United States*, 480 U.S. 522, 525 (1987)

[66] *See* Rules and Regulations Implementing the Telephone and Consumer Protection Act of 1991, *Memorandum Opinion and Order*, 10 FCC Rcd 12391 ¶ 29 (1995).

facsimile machine. As the House Report explained, "facsimile machines are designed to accept, process, and print all messages which arrive over their dedicated lines. The fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that it will be received and printed by the recipient's machine."[67]

Unlike faxes sent to a "telephone facsimile machine," faxes sent to a fax server or personal computer can be deleted by the recipient without ever being printed to paper. Indeed, such electronic faxes can be deleted without ever being viewed by the intended recipient. Accordingly, the transmission of facsimiles to these devices simply does not implicate the policy concerns with cost shifting underlying Section 227(b)(1)(C) and in no event meet the definition of a telephone facsimile machine.[68]

2. The Technological Differences Between Traditional Telephone Facsimile Machines and New Paperless **Fax** Devices Have Important Ramifications Under the First Amendment.

The technological differences between transmissions to traditional fax machines and **fax** servers and personal computers have important constitutional ramifications. The TCPA's prohibitions against unsolicited facsimile advertisements directly regulate truthful commercial speech about lawful activities and therefore must be justified under the familiar *Central Hudson* test." Under this test, the asserted governmental interest in restricting unsolicited facsimile advertising must be substantial, the government must show that its speech restriction directly and materially advances the asserted governmental interest, and the government must narrowly tailor

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[67] *House Report*, H.R. REP. No. 102-317, at 25; *see also* S. REP. NO. 102-178 ("unsolicited calls placed to Fax machines . . . often impose a cost on the called party (fax messages require the called party to pay for the paper used . . .").

[68] 47 **U.S.C.** § 227(b)(1)(C).

[69] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557 (1980)

its restriction to the asserted interest.'" The core of the *Central Hudson* analysis, reflected in the latter two prongs, is that the First Amendment demands a "reasonable fit" between a speech-restrictive regulation and the government's asserted goal, such that the challenged regulation advances the government's interest "in a direct and material way."[71] To withstand this test, the record must indicate "a reasonable fit between the [regulatory] ends and the means chosen to accomplish those ends . . . a means narrowly tailored to achieve the desired objective."[72] On the whole, the record also must indicate that the legislature has "carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition."[73]

At least one federal court has expressed considerable skepticism about the strength of the government's asserted interest in preventing fax advertisers from shifting advertising costs to recipients, noting the paucity of material in the legislative history indicating a real problem in this area.[74] But even assuming the substantiality of the government's interests, a blanket prohibition against the transmission of unsolicited fax advertisements to fax servers and computers could not survive scrutiny under *Central Hudson*, because such a ban would not directly and materially further the government's interest in preventing advertisers from unfairly shifting costs to consumers.

Moreover, such a prohibition could not possibly be considered to represent a "reasonable fit" between the legislatures' ends and means, because there is nothing to suggest that Congress

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[70] *Id.* at 566.

[71] *Edenfeld v. Fane*, 507 U.S. 761, 767 (1993).

[72] *Id.* (citations omitted).

[73] *City of Cincinnati v. Discovery Network.* 507 U.S. 410,417 (1993) (internal quotation omitted).

[74] *Missouri* v. *American Blast Fax*, 196 F. Supp.2d 920 (E.D. Mo. 2002)

ever weighed the costs and benefits of restricting the transmission of advertisements to fax servers and computers, as opposed to traditional telephone facsimile machines. Indeed, because the recipient can delete a fax transmission from his or her computer without ever reducing it to paper: a fax sent to a computer is closely analogous *to* direct mail advertising – a medium that Congress ***expressly distinguished*** from the unsolicited facsimile advertising that it sought to suppress through the TCPA. For example, the House Committee found that "when an advertiser sends marketing material to a potential customer through regular mail, the recipient pays nothing to receive the letter."[75] By contrast. the Committee noted that "[i]n the case of fax advertisements . . . the recipient assumes both the cost associated with the use of the facsimile machine and, the cost of the expensive paper used to print out facsimile messages. It is important to note that these costs are borne by the recipient of the fax advertisement regardless of their interest in the product or service being advertised."[76]

Significantly, the courts consistently have held that the First Amendment protections for commercial speech override asserted interests in restricting the flow of intrusive or offensive direct mail advertising, and the same considerations would prohibit a blanket ban on fax advertising sent to personal computers and fax servers. **As** the Supreme Court has observed, "we have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended. The First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech."[77] Because "[r]ecipients of objectionable mailings . . . may effectively

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[75] *House **Report***, H.R. REP. NO. 102-317, at 25.

[76] ***Id.; see** also **Telemarketing Practices***, Hearing before the Subcommittee on Telecommunications and Finance on H.R. 628, H.R. 2131, and H.R. 2184, at 3 (May 24, 1989).

[17] ***Bolger v. Youngs Drug** Prods. **Corp.**.*463 U.S. 60, 72 (1983) (internal quotation omitted).

avoid further bombardment of their sensibilities simply by averting their eyes," the *Bolger* Court concluded that "the short, though regular, journey from the mailbox to trash can . . . is an acceptable burden, at least so far as the Constitution is charged."[78] Of course, the virtual pathway between a computer user's email inbox and the trash can on his or her desktop involves an even briefer journey. Because the recipient of an advertisement sent to a fax server or personal computer is no more bound to review and pay the cost of printing the message than a direct mail recipient if he or she has no interest in the advertised product or service, a prohibition on such advertisements cannot "directly and materially advance" Congress' interest in adopting Section 227(b)(1)(C) to prevent advertisers from unfairly shifting costs to consumers.

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems," the law must be construed "to avoid such problems unless such construction is plainly contrary to the intent of Congress."[79] Here, the Commission can and should avoid constitutional problems by construing Section 227(b)(1)(C) – consistent with the statutory language – not to apply to advertisements sent to fax servers, personal computers and other devices that cannot independently transcribe advertising copy into an electronic signal or transcribe electronic fax signals onto paper. There is no statutory basis, policy reason nor constitutional justification for the prohibition of advertisements sent to these devices.

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[78] *Id.* (internal quotations and citations omitted); *see also Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff'd*, (2d Cir. 1967).

[79] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988).

### C. The Commission Should Clarify the Boundaries of Liability under the TCPA, Including Specifically that Section 217 Does Not Create Unique Obligations for Common Carriers under the TCPA.

1. Liability Should Rest With the Party Who Determines the Destination of Fax Advertisements.

Technological advances also have resulted in the growth, since 1991, of fax broadcasters who transmit advertisements to a large number of telephone facsimile machines for a fee and "maintain lists of telephone facsimile numbers that they use to direct their clients' advertisements."[80] As the Commission has recognized, "the apparent prevalence of fax broadcasters that determine the destination of their clients' advertisements" raise unique liability issues that necessitate Commission clarification regarding the appropriate allocation of liability under the TCPA.[81]

Fax broadcasters rarely act as mere passive conduits for their advertiser customer's messages. Instead, as demonstrated by the Commission's findings in its Notice Apparent Liability directed to Fax.com, fax broadcasters frequently determine the destination of the messages that they send on behalf of their customers and they actively compile and market databases of fax numbers used in fax advertising campaigns. Indeed, the major perpetrators of TCPA fax violations today are the fax broadcasters who convince legitimate businesses interested in reaching new customers that it is lawful to fax intrastate or in bulk, or worse, that the intended recipients have provided consent to receive facsimile advertisements. For example, when the Texas Attorney General sued American Blast Fax for its deceptive practices and TCPA

[80] *NPRM* at ¶40

[81] *Id.*

violations, the court specifically addressed ABF's culpability, stating that "the State presents evidence that Blast Fax -- by express representations and by failing to disclose information about the **TCPA** and/or information about the Court's October 5,2000 order – told potential customers and fax recipients in Texas that Blast Fax's unsolicited intrastate fax advertisements are not unlawful in any manner."[82]

In light of the fact that fax broadcasters, rather than their advertiser customers, often are the moving force behind large scale violations of the TCPA, the Commission should reconsider its statement in its 1995 Reconsideration Order" that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule." Class action attorneys have used this language to urge courts to adopt a standard of strict liability -- a standard that turns the statute on its head by absolving the actual fax sender of responsibility, while imposing liability on the advertisers regardless of whether they were involved in the transmissions or the selection of the destination of the advertisements This standard of strict advertiser liability creates unintended consequences, results in an inequitable apportionment of responsibility and sweeps innocent bystanders into the fray.

Nextel's own experience is illustrative, In its pending class action lawsuit in Texas, Nextel was not a sender of fax advertisements and was not even an *advertiser—i.e.*, Nextel did not contract with a fax broadcaster to disseminate advertising material on its behalf. Rather, Nextel merely was the source of products and services *advertised* by an independent third-party dealer via faxes transmitted by that dealer's independent contractor, American Blast Fax.[84]

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[82] *Texas v. American Blast Fax.* 159 F. Supp. 2d 936,940-41 (W.D. TX. 2001)

[83] 10 FCC Rcd 12391, ¶ 35 (1995).

[84] Nextel's only role in the matter was largely administrative, as it approved the allocation of advertising dollars and content through its independently contracted vendor.

Despite having only the most attenuated connection to the alleged violations Nextel has become embroiled in costly class action litigation

To eliminate such unintended consequences, the Commission should clarify that, when it is the fax broadcaster that determines the destination of fax advertisements and promotes the legitimacy of the method, the fax broadcaster, and not the advertised business, should be responsible under the TCPA. Accordingly, the Commission should specify by rule that it is the party (or parties) determining the destination of the facsimile advertisement that is liable for any violation of the TCPA. At the same time, the Commission should clarify that parties who do not control and have no knowledge of the destination of these advertisements are not liable for such activities. This rule is particularly appropriate because, as a consequence of the established business relationship exception to the prohibition on unsolicited facsimile advertising, only the entity or entities who know the destination of the advertisements would know whether these advertisements violate the TCPA prohibition

2. Section 217 Applies to Nondelegable Carrier Obligations, Not the TCPA

The Commission should clarify that Section 217 of the Communications Act does not impose a higher level of liability on common carriers than other entities for violations of the TCPA.[85] Section 217 merely codifies common law agency principles and ensures that carriers cannot avoid responsibility for complying with unique common carrier duties by purporting to

[85] The plaintiffs bar's use of Section 217 to impose a higher level of liability on carriers is not surprising. When independent contractors violate the law, they are liable for the consequences, not the party hiring them to perform the service. This is especially true where such independent contractors represent and warrant that they will follow the law in executing their obligations, much as did Nextel's independent dealers. TCPA cases properly have been dismissed on this basis. Reading Section 217 to apply to TCPA cases conveniently avoids this outcome. Nextel urges the Commission to make it clear that whether a person is an independent contractor and responsible for his own acts under the TCPA is a matter of state agency law.

delegate them to third parties.[86] The Commission should confirm that Section 217 does not make common carriers automatically liable whenever an independent contractor violates a law of general applicability.[87]

The plaintiffs bar's argument that, under Section 217, carriers are always vicariously liable for the acts of their independent contractors contravenes established common law agency principles, whereby " . . . the term 'independent contractor' is used to indicate all persons for whose conduct, aside from their use of words, the employer is not responsible *except in the performance of nondelegable duties*."[88] Section 217 ensures that common carriers are responsible for the actions of their agents when those agents violate the Communications Act. Section 217 does not, however, make carriers liable for the acts of independent contractors except in those limited circumstances when the independent contractor is carrying out a nondelegable common carrier obligation under the Act.

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[86] 47 U.S.C. § 217. Section 217 provides that "in construing and enforcing the provisions of this Act, the act, omission, or failure of any office, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person."

[87] 47 U.S.C. § 217. Section 217 provides that "in construing and enforcing the provisions of this Act, the act, omission, or failure of any office, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person."

[88] Restatement Second of Agency § 2 (emphasis added). *See also Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354 (Tex. 1998) (Employer did not retain sufficient control over manner and means by which employees of independent contractors performed their maintenance services to incur duty to use reasonable care to ensure that independent contractors performed their work in a reasonable manner, despite employer's insistence that independent contractor observe and promote compliance with federal laws . . .").

The language of Section 217 establishing common carrier liability is derived from a similar provision in the Elkins Act.[89] The Elkins Act eliminated rebates, concessions or discrimination from the handling of commerce and contained a provision regarding common carrier liability for acts of agents.'" Application of the Elkins Act followed traditional common law agency principles, and the courts have assigned liability to corporations under this statutory provision consistent with traditional agency law.[91]

Likewise, the Commission has interpreted Section 217 to be consistent with common law agency principles, by imposing liability on carriers in cases where an independent contractor was hired to carry out nondelegable common carrier obligations.[92] The Commission has emphasized the need to ensure that telecommunications service providers do not avoid their statutory

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[89] **A** LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 50, 363, 441 (Max D. Paglin, ed., 1989) ("Section 217, affirming the liability **of** carriers for acts and omissions of their agents, follows the provision originally introduced in the Elkins Act of 1903."). *Id*. at 330 ("Section 217: This states for general application which is provided in some individual sections of the I.C. Act and in general terms of section I of the Elkins Act."). *Id*. at 363 ("Section 217 is in the Elkins Act.").

[90] 49 U.S.C. § 41 ("...That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act shall also be held to be a misdemeanor committed by such corporation...").

[91] *See, e.g., United States of America v. General Motors Corporation*, 226 F.2d 745, 749 n.5 (1955) ("In determining whether or not the Corporation has violated the Elkins Act, the Corporation is held responsible for all the acts of its officers and agents in the course of their employment."); ***New** York Central and Hudson R.R. v. United States*, 212 U.S. 481, 492-296 (1908) (The Supreme Court imposed criminal responsibility on a corporation for **an** act done while an authorized agent of the company was exercising the authority conferred upon him.").

[92] ***See,*** *e.g.*, ConQuest Operator Services Corp, *Order of Forfeiture*, 14 FCC Rcd 12518, ¶ 10 n.29-30 (1999) (citing Restatement Second of Agency § 268 in conjunction with Section 217.).

common carrier obligations under the Communications Act by assigning those obligations to third parties outside of their control.[93]

However, where there is no nondelegable common carrier obligation at issue, there can be no basis for holding a carrier liable for the acts of entities that are not its agents. For example, a common carrier should not be held liable for the marketing activities of its independent contractors, e.g., its authorized dealers, to any greater extent than an automobile manufacturer should be held liable for the marketing activities of its authorized dealers. Common law agency principles should apply to both scenarios, and the common carrier should not be held to higher standard and greater liability than the automobile manufacturer or other entities under the TCPA. Consequently, the Commission should clarify that Section 217 does not impose any unique, discriminatory obligation or liability on common carriers for compliance with the TCPA.

[93] *See* Long Distance Direct, Inc., *Memorandum Opinion and Order,* 15 FCC Rcd 3297, ¶ 9 (2000) ("Congress's clear intent in enacting section 217 was to ensure that common carriers not flout their statutory duties by delegating them to third parties."); Vista Services Corporation, *Order of Forfeiture*, 15 FCC Rcd 20646, ¶ 9 (2000).

## V. CONCLUSION

Nextel fully supports the Commission's clarification of the TCPA rules to prohibit the deceptive practices of unscrupulous telemarketers, but also cautions the Commission against the imposition of costly requirements that will unduly burden legitimate telemarketers in today's precarious economy. The Commission should take the regulatory actions discussed above to provide clarity and consistency to the market and provide guidance and protection for companies that legitimately seek to follow the rules, while developing efficient marketing solutions to minimize cost and maximize service lo consumers.

Respectfully submitted,

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